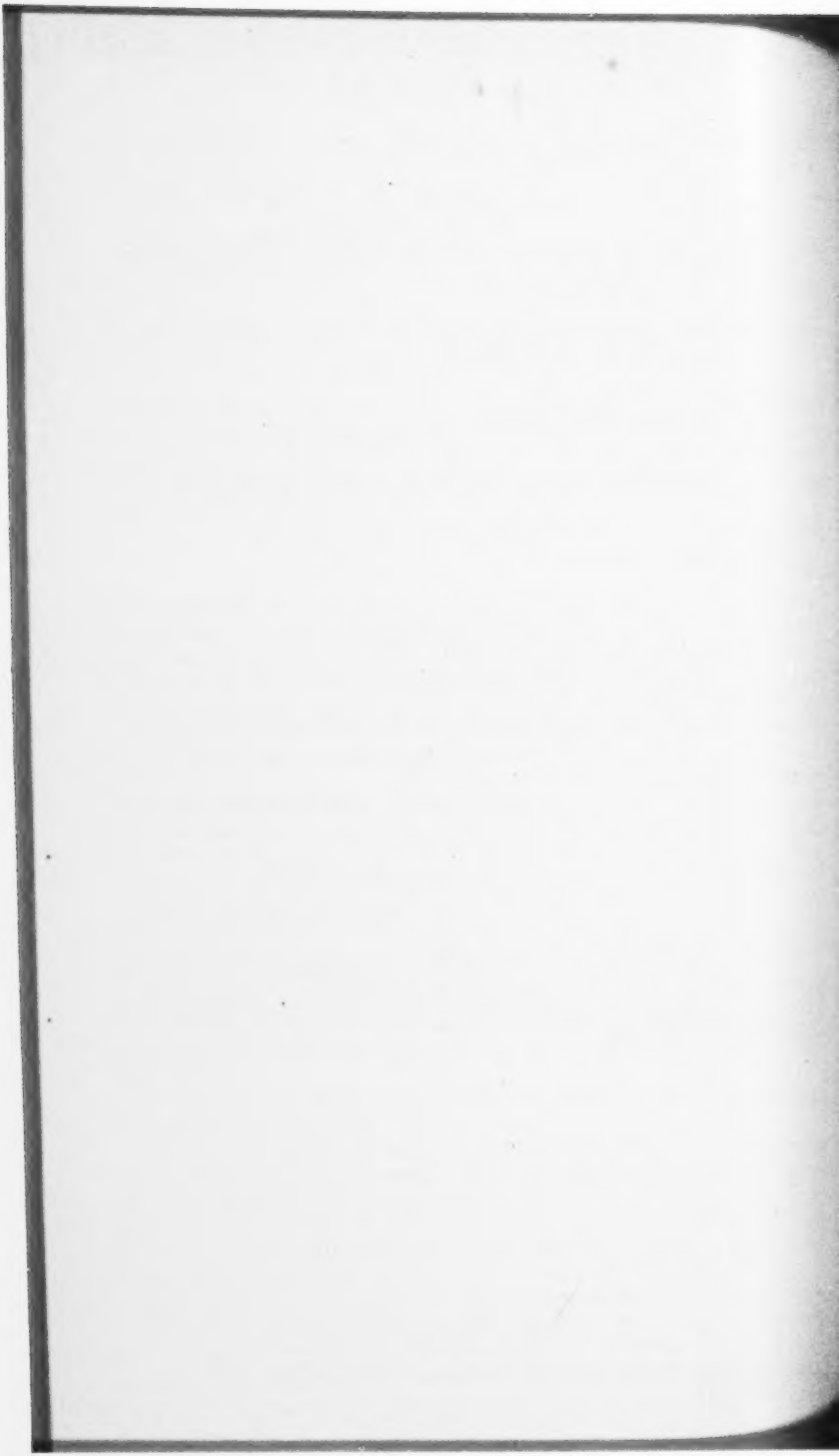


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No. 217.

Brf. of Webb for Appellants.

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In the Supreme Court of the United States.

No. 217.

FLORENCE AUDUBON AND JOHN W. HULSE, ASSIGNEE,

vs.

ROBERT W. SHUFELDT.

BRIEF FOR APPELLANTS.

HENRY RANDALL WEBB,
Counsel for Appellants.

In the Supreme Court of the United States.

No. 217.

FLORENCE AUDUBON AND JOHN W. HULSE,
ASSIGNEE,

vs.

ROBERT W. SHUFELDT.

This is appeal from a decision of the District Court of the United States for the District of Columbia, adjudicating Captain Robert W. Shufeldt, a surgeon in the U. S. Army on the retired list, a bankrupt and discharging him from the payment of his debts.

The grounds for this appeal are:

FIRST.

That the appellee is not and never has been a bankrupt and is not entitled to claim the benefit of the General Bankruptcy Act of July 1, 1898; and that the attempt on his part to be discharged from the payment of his debts constitutes a fraud upon his creditors.

The term bankrupt is applied to a man, who has failed in business, or who, through some misfortune, has suffered great pecuniary loss, and in consequence thereof become unable to pay his debts. The law considers it more just to release and discharge this man from the payment of his debts than let him lead the balance of his life, weighed down and harrassed with debts which he never can pay.

> "The two chief objects or general purposes of a bankrupt law are the relief of unfortunate persons,

> who by losses in business have become insolvent and unable to pay their debts in full, and the equitable distribution among creditors of whatever property such persons may still have. It is chiefly the relief of business men, *as business men*, and indirectly for the public good, and rehabilitating them to a condition in which, as active business men, they may take their proper share in the productive and industrial class of the community."
>
> In re Lachmeyer, Fed. Cas. 7966.

But with the appellee, Captain Shufeldt, none of these facts exist. He has never failed in business or met with great financial loss. He has received a regular salary from the United States Government, and his ability to pay his debts upon the day when he filed his petition in bankruptcy, was the same as when he contracted them.

> " A bankrupt is a person unable to pay his debts."
>
> Kuntzler *vs.* Kohaus, 5 Hill, 319.

This is not the case with Captain Shufeldt. His salary is now and has been for many years One hundred and seventy-five dollars ($175) per month, his pay as a retired officer of the army. This salary has always been promptly paid and he has only to live and behave himself to receive it, while he can devote his entire time toward the increase of his income. With reasonable effort and economy he could easily have paid his debts, had he chosen so to do.

Again, Captain Shufeldt gives up nothing, because he maintains that his only possessions, consisting of household furniture, are exempt; and that his salary can not be attached by his creditors.

Thus he claims the right to receive from the United States Government the sum of $2,100 per year (an income equal to 6 per cent. on $35,000, or 5 per cent. on $42,000) his pay as a retired army officer, while at the same time, he calls himself a bankrupt, and claims the privilege of being discharged from the payment of his debts.

It is reasonable to suppose that the Bankruptcy Act of July 1, 1898, was never intended to apply to a case like this, and that its makers never contemplated allowing a man in receipt of a handsome salary, to obtain the benefit of its provisions, and at the same time to reserve to himself the full benefit of that salary.

If such be the law, then this act is not only a travesty on justice and honesty, but an encouragement to fraud and a boon to the swindler and the cheat.

While it is true that his salary can not be attached by legal process, still he should not be allowed to receive the benefits of the Bankruptcy Act and be discharged from the payment of his debts, and at the same time be allowed to receive and reserve to himself his salary, as an officer of the U. S. Army.

If the law grants him this privilege, it does an act of great injustice to the creditors of this officer, because it deprives them of the only means they have of making him pay his debts.

Officers of the army can be tried by court martial if they do not pay their debts upon the complaint of their creditors. This is a means not infrequently resorted to in such cases. But in this case the court, by discharging Captain Shufeldt from the payment of his debts, has deprived his creditors of this, their only remedy.

Captain Shufeldt was tried by court martial for the non-payment of his debts; he pleaded his discharge in bankruptcy and was acquitted for that reason.

General Merritt, who disapproved the findings of this court martial, said:

> "The Government does not give officers respectability of rank and the benefit of retired pay to enable them to take advantage of the bankruptcy act, in order to rid themselves of indebtedness incurred through their own fault and in purely domestic and private matters, disconnected with any business venture."

An examination of Shufeldt's indebtedness (Rec. p. 4), exclusive of the debt of $3,200 secured upon his real property in Maryland, will show it to be of two kinds: First, the indebtedness incurred on account of the divorce, which his former wife obtained from him on account of his adultery, *i. e.*, $650 (wrongfully set down as $800) arrears of alimony; $150, note, given for taking testimony in that case; and $150, his attorney's fee for service, rendered in connection with said case; in all, $950.

Second. The sum of $238.33 for food, clothing, etc., furnished himself and wife shortly before he filed his petition in bankruptcy.

It is evident, therefore, that none of the debts, from which Captain Shufeldt seeks discharge, were contracted in any business venture or enterprise; but as General Merritt says, they are purely private and domestic matters.

He is not a bankrupt; but he seeks, through the technicalities of the Bankruptcy Act, to be released and relieved from a duty, imposed upon him by a decree of the Circuit Court for Montgomery County, on account of his infidelity to his wife, and the obligations incurred by him in resisting said decree; and incidentally to be discharged from the payment of debts, contracted for food and clothing furnished him upon his credit as an officer of the United States Army.

If such discharge can be obtained once, there is nothing to prevent its being obtained as often as the so-called bankrupt may desire it. The disgraceful spectacle may then be seen of army officers and other Government employees repeatedly seeking and obtaining, at little or no loss or inconvenience to themselves, discharges from the payment of their debts, under the provisions of the Bankrupt Act of July 1, 1898, while they retain the full benefit of the salaries paid them by the U. S. Government, upon the credit of

which they have been able to contract the debts from which they seek discharge.

Captain Shufeldt's salary is not exempted from attachment under the provisions of section 797, R. S. D. C.; nor under the amendment thereto made June 19, 1878.

20 Stat. at Large, 173.

See Chapter 321, Richardson's Supplement (2d edition), 196.

Captain Shufeldt is a retired officer of the Army, and is performing and has for several years performed no duty for the Government; and draws his pay as a reward for services entirely passed, in order to enable him to live in a manner becoming his rank. His pay is therefore rather in the nature of an annuity than a salary for which service has to be rendered.

If this annuity came from a private source it would be liable to attachment by his creditors.

Degraw *vs.* Clason, 11 Paige, 136.

It is respectfully submitted that Captain Shufeldt is not and never has been a bankrupt; and should not be allowed to occupy the exceedingly anomalous position of being adjudged a bankrupt and discharged from the payment of his debts, while by reason of the annuity given him by the United States Government, he is in possession of ample means to pay them.

SECOND.

That alimony in arrear is not a provable debt in bankruptcy and can not be affected by the discharge of the bankrupt.

In this case the alimony was given by a Maryland court in a decree of divorce granted on account of the adultery of the petitioner in bankruptcy.

The weight of the decisions prior to the passage of the present bankruptcy law was in favor of the appellant's contention and against the decision of the lower court.

> "A decree for alimony has been held to be not a judgment for enforcement of a contract but for the enforcement of a duty in the performance of which the public as well as the parties are interested."
>
> Andrew *vs.* Andrew, 62 Vt. 495.
> Noyes *vs.* Hubbard, 15 L. R. A. 394.
> Romaine *vs.* Chauncey, 14 L. R. A. 714.
> Linton *vs.* Linton, 15 Q. B. Div. 239.

> "The husband is bound to support the wife, yet this duty is an imperfect obligation, which is not technically a debt. He does not owe her any specific amount of money but he owes a duty to her, which may be enforced by the order of the court, compelling him to pay her alimony."
>
> Ex parte Perkins, 18 Cal. 180.
> Tolman *vs.* Leonard, 6 App. D. C. 233.

Several decisions have been made since the passage of the present Bankruptcy Act, both for and against the appellant's contention that arrears of alimony do not constitute a provable debt, which can be discharged in bankruptcy.

Those in favor of appellant's contention are:

In re Anderson, 97 Fed. Rep. 321.
In re Shepherd, 97 Fed. Rep. 187.
In re Emil Smith, 3 Am. B. R. 68.
In re Nowell, 3 Am. B. R. 837.

Those against appellant's contention are:

In re Houston, 94 Fed. Rep. 119.
2 Am. B. R. 107.
In re Van Orden, 96 Fed. Rep. 86.
2 Am. B. R. 801.
In re Challoner, 98 Fed. Rep. 82.
3 Am. B. R. 442.

The error in the decisions against the appellants' contention is that they fail to distinguish the fundamental difference between a decree in equity and a judgment at law, and treat both as the same in effect, and as being a mere liability to pay a debt, provable in bankruptcy under the provisions of section 63 a (1) of the act.

This error is clearly pointed out by Referee Hotchkiss in In re Emil Smith, 3 Am. B. R. 77, who very appropriately concludes his remarks by saying:

> "Alimony is no longer, if it ever was, a mere liability to pay in the sense of Sec. 63 a (1) it is a liability to do, reduced to be sure, to dollars and cents, but only because of the practical impossibility of enforcement otherwise."

The decisions in the cases, In re Houston and In re Van Orden are inapplicable to the case at bar, as clearly appears from the opinion of Lowell J., in the case of In re Nowell, 3 Am. B. R. 840, 841.

It is best, therefore, not to pay too much attention to the formula—the dress—the garb, which a decree or judgment wears, when it comes for justice, but to look rather to the nature of the liability and the original cause of action.

See In re Cotton, Fed Cas. 3269.

Looking at the nature of the liability in the case at bar we may well conclude that:

> "Permanent alimony is regarded rather as a portion of the husband's estate, to which the wife is equitably entitled, than a debt."

In re Lachmeyer, Fed Cas. 7966.
In re Garrett, 2 Hughes, 235.
Fed Cas., 5252.
Barclay *vs.* Barclay, 56 N. E. 822.

But the principal reason why alimony should not be considered a debt provable in bankruptcy, is that it is always

subject to modification by the court which grants it, and can be increased or diminished, if the occasion demands, at the request of either party. This is its chief characteristic, and in this respect it differs materially from a judgment at law and from almost every other decree in equity.

It can not therefore be said to constitute, in any sense, a fixed liability.

> "The allowance of alimony is not in the nature of an absolute debt. It is not unconditional and unchangeable. It may be changed in amount, even when in arrears, upon good cause shown to the court having jurisdiction."
>
> Tolman *vs.* Leonard, 6 App. D. C. 233.
> In re Lachmeyer, Fed. Cas. 7966:
> Mulock *vs.* Mulock, 18 N. J. Law, 188.
> Alexander *vs.* Alexander, 13 App. D. C. 334.
> Andrew *vs.* Andrew, 62 Vt. 495.

If the appellee had been really a bankrupt, and if he had had any claim to be considered one, he could easily have applied to the Maryland court and, upon a proper showing, had the alimony reduced or discharged *in toto*.

But knowing that he was able to pay this alimony, had he chosen so to do, and that his contention was a fraudulent one, he was afraid to apply to the Maryland court, but sought refuge in the technicalities of the Bankruptcy Act.

This action is utterly without merit, and should receive nothing but condemnation from every respectable person.

In the case of Linton *vs.* Linton, 15 Q. B. Div. 244, where the bankruptcy was self-imposed and apparently for the sole purpose of cutting off alimony, as in the case at bar, Brett, the Master of Rolls, in referring to this attempt to cut off alimony, said: "Anything more disgraceful, in a moral point of view, can not be imagined."

Alimony has also been said to be something higher than a mere liability to pay; it is an obligation to support, which, taken at marriage and continuing through life, has been

measured up and temporarily determined by a court, but which is absolutely inalienable and undischargeable, and, save in amount, beyond the control of the courts, except with the consent or on the fault of the wife.

Haight, J., in Wetmore *vs.* Wetmore, 149 N. Y. 520, said: "Equity will not feed the husband and starve the wife."

But in the case at bar it would seem that this very thing has been attempted; the husband, while having ample means, is freed from liability for the support of his wronged and injured wife, and she must take care of herself or be supported by friends. This is indeed a travesty on all the principles of equity and justice.

It is therefore respectfully submitted that the rulings of the court below should be overruled, and the appellee declared not to be entitled to the benefits of the Bankruptcy Act.

But if, under the provisions of the present Bankruptcy Act, he can be declared a bankrupt, it is further submitted that he should not thereby be released from the payment of the arrears of alimony, and that the woman he has wronged should not be deprived of that portion of his income, which the Maryland court had decided in equity and justice she is entitled to receive.

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